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No. 15-866

IN THE
Supreme Court of the United States

STAR ATHLETICA, L.L.C.,
Petitioner,

v.

VARSITY BRANDS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE FOR THE ROYAL MANTICORAN NAVY: THE OFFICIAL HONOR HARRINGTON FAN ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 17 U.S.C. §107 supports the Petitioner's claim that the designs, as presented by the Respondent, do not constitute a copyrighted pictorial, graphic, or sculptural work.

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Heros of CosPlay (SyFy Network 2013) 4
See Masquerade—Contest Information and Rules, San Diego Comic-Con International, 2014, https://www.comic-

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con.org/sites/default/files/forms/cci2014_masqrules_v1.pdf. 4

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"AACCA.org Cheerleading as a Sport." *AACCA.org Cheerleading as a Sport*. Web. 01 Feb. 2016 18

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Royal Manticoran Navy: The Official Honor Harrington Fan Association, Inc. (hereinafter TRMN, Inc.) is a 501(c)7 social organization founded for the purpose of serving as a nexus for fans of author and copyright holder David Weber's Honor Harrington series of books[1]. Among those fans are

[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no

those who wish to participate, and enjoy participating, in the costuming aspect of modern fandom, also known as Costume Play (hereinafter CosPlay). This CosPlay comes about for TRMN, Inc. because it is officially licensed by Mr. Weber as a source of the various accessories required for accurate Honorverse CosPlay, including award ribbons, insignia, and uniforms.

TRMN, Inc. believes and advocates that members of the public, and not-for-profit corporations set up for the purpose of celebrating fictitious realms, should have the right to be able to create derivative works based on both conceptual and final art work, that was not otherwise designed for viewing off the screen or paper.

INTRODUCTION

When it was founded in 2007, TRMN, Inc. immediately began looking into ways to be able to offer its membership opportunities to, and the ability to, attend various Science Fiction conventions while dressed as members of the Royal Manticoran Navy from the Honor Harrington book series. As a result of this, a search for vendors who could make the various accessories and uniforms was begun. It was important for TRMN, Inc., however, that this was done correctly; to that end, one of our members reached out to Mr. Weber and requested his permission to become both official and licensed. This was granted, and the leadership began to search for vendors.

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counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for both parties have consented to filing this brief.

Had this officially licensed status not been granted, it would have fallen to each individual member to find a way to bring their CosPlay to life. This could have included a number of options, many of which members still use to create official uniforms: Sewing their uniforms themselves,; grouping together with a few others to approach a costuming shop to have uniforms made; modifying other outfits, such as chef jackets, to make a uniform; having a professional seamstress or tailor custom make the uniform; or going without a uniform.

Even with this officially licensed status, TRMN is cognizant that such status is always revocable. In that case, should Varsity Brands argument win the day, TRMN, Inc. and its members could be in a precarious position. To that end, TRMN, Inc. feels compelled to support Star Athletica, LLC in their petition to overturn the 6th Circuit Courts ruling.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the blanket consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

According to Wikipedia, CosPlay is "a performance art in which participants called cosplayers wear costumes and fashion accessories to represent a specific character."[2] The first recorded occurrence of this phenomenon in western culture was at the 1939 1st World Science Fiction Convention which was held in Caravan Hall, New York. The attendee in question

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2 Cosplay, Wikipedia, January 22, 2016, https://en.wikipedia.org/wiki/Cosplay.

dressed in what they described as "futuristicostume" and was based on the artwork of Frank R. Paul[3].

In 2013 the SyFy Channel ran a show called *Heroes of CosPlay*[4] which, while met with criticism for its mean spirited portrayal of those who participate in CosPlay more as a hobby, did manage to pull in solid Nielsen ratings and a viewership of approximately one million viewers. That show, however, is only a small representation of a far larger community of CosPlayers. The Court should also take into consideration such cultural phenomenon as the San Diego Comic-Con or DragonCon in Atlanta. Both of these have heavy CosPlay components, including contests for most original works and best overall works. Many of these are designs or variations of designs that the CosPlayers have seen in movies, anime, and comics. Many of the higher tier of competitions, such as those at San Diego Comic-Con, offer cash prizes[5], introducing the possibility of earning not insignificant amounts of money for costuming efforts.

Organizations such as TRMN[6], the 501st Legion[7] (a Star Wars fan organization), and STARFLEET

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[3] Kyle David, *Caravan to the Stars*, 29 Mimosa 55-59, *available at* http://www.jophan.org/mimosa/m29/kyle.htm.

[4] *Heros of CosPlay* (SyFy Network 2013).

[5] *See Masquerade—Contest Information and Rules, San Diego Comic-Con International*, 2014, https://www.comic-con.org/sites/default/files/forms/cci2014_masqrules_v1.pdf

[6] *See About Us*, The Royal Manticoran Navy: The Official Honor Harrington Fan Association, Inc., May 16, 2016, http://www.trmn.org/potal/index.php/about-us

[7] *See Our Mission*, 501st Legion: The World's Definitive Imperial Costuming Organization, January 25, 2016, http://www.501st.com/mission.php

International (a Star Trek Fan Organization[8]), represent three of the largest groups of fans with a combined total of approximately 14,000 members. A majority of those members participate primarily to CosPlay in their respective universes. Both TRMN and the 501st are official and licensed organizations, so their permission to use copyrighted elements is governed by the companies who granted them that status--Words of Weber and the Walt Disney Corporation respectively. STARFLEET International is not an officially licensed organization, and at least one incident has already occurred which could have repercussions for other CosPlay groups. A subgroup of STARFLEET International, known as the STARFLEET International Marine Corps, used a logo that was derived from the United States Marine Corps logo. In 2013, they were contacted by and informed that the United States Marine Corps had the rights to a fouled anchor behind a circle, and that the logo of the STARFLEET International Marine Corps infringed on this logo, even though it contained multiple points of difference. 2015 they were sent a Cease & Desist Letter explaining that due to their First Brigade using the 1st Marine Division "Guadalcanal" emblem of the US Marine Corps as inspiration, it violated the copyright of the United States Marine Corps. This goes against not only the spirit of copyright, but also the actual intentions behind the various copyright laws in the United States. If the current issue is decided in favor the Respondents it is likely that similar instances will occur, and there could be a significant chilling effect

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[8] *See An Introduction To Starfleet*, Starfleet International, January 25 2016, http://sfi.org/about-starfleet/

on both the CosPlay and other creative communities across the country.

SUMMARY OF ARGUMENT

In this case, Varsity Brands, Inc. seeks to exert copyright protection for uniform design elements which consist of chevrons, lines, curves, stripes, angles, diagonals, inverted chevrons, coloring, and shapes. These elements, it is argued by the Respondent, are the essential elements of a cheerleading uniform, and that is the question the Sixth Circuit addressed.

The Petitioner argues that these simple shapes are not by themselves copyrightable as they are staple or commonplace geometric shapes. This amicus brief agrees with that assessment. It also examines the nature of the control Respondent exercises over the whole of the cheerleading world. The Respondent effectively exercises a monopoly over that entire industry, creating a situation in the instant case that could have far reaching implications.

The core of this case is the question of what the function of a uniform is under the law. The majority opinion in the Sixth Circuit found that the function of a cheerleading costume is to cover the body, which allowed it to find that the designs on the uniform were separable and protectable elements. The dissent believed the function of a cheerleading uniform was to identify a cheerleader, and thus the designs were inseparable and not subject to protection. The weight of history and intent in copyright support the latter interpretation, rather than the former.

TRMN, Inc. agrees with the Petitioner's assertion that the function of a cheerleading uniform is not to

cover the body but to identify one as a cheerleader, and urges the court to adopt a standard that represents the traditional definition of clothing as a useful article and does not inequitably expand the control companies such as Respondent may exert over copyright.

ARGUMENT

I. NOTHING IN THE UNITED STATES CODE OR CASE LAW SUPPORTS THE RESPONDENTS ARGUMENT OF THE COYPRIGHTABILITY OF THEIR DESIGNS.

The Copyright Clause of the Constitution reads: "The Congress shall have power to...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. This was derived from an earlier British Law, passed in 1710, known colloquially as the Statute of Anne[9]. This law laid down the fundamental ideas of copyright and influenced the development of both the law of the United States and many other common law countries.

A design is protected in general when "the designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public." 17 U.S.C. §1301(a)(1). A "design" is later defined as original if "it is the result of the designer's creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source." *Id.* The law also speaks

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[9] *See* Copyright Act of 1709, (8 Ann. c.21)

to what is not protected, specifically, "staple or commonplace, such as a standard geometric figure, a familiar symbol, an emblem, or a motif, or another shape, pattern, or configuration which has become standard, common, prevalent, or ordinary." *Id.*

To this day, the copyright cases that have come before the courts have not directly dealt with the specific issue in this case. While there have been cases close to point, there is much in this case that is closer to an issue of first impression then one of settled law. However, previous decisions give insight into how it should be viewed.. Of specific interest here is the case of *Gyles v. Wilcox*, 26 ER 489 (1790), a case before the Chancery Court in the United Kingdom. This case discusses the Statute of Anne, which influenced the copyright protections in the U.S. Constitution. The important takeaway from this case is in the opinion of Judge Hardwicke. In it, he favored a liberal interpretation of copyright protection: "... it ought to receive a liberal construction, for it is far from being a monopoly..." *Id.*

Although *Gyles* primarily covered books, as do many of the original copyright cases, the principles are easily applicable to clothing design as well. The first case in the United States to explore this concept was *Folsom v. Marsh,* 9 F.Cas. 342 (C.C.D. Mass. 1841), which first established the right of Fair Use, which had previously been viewed as a common-law doctrine.

Folsom v. Marsh, makes a salient point in the opinion issued by Judge Story, famously later an Associate Justice of this Court. In the Opinon, Judge Story states:

"If so much is taken, that the value of the original is sensibly diminished, or the labors of the original

author are substantially to an injurious extent appropriated by another, that is sufficient..." *Id.*, at 348.

This is of particular importance in this case, where the Respondent has argued that the use of simple geometric shapes, in patterns similar to theirs, violate the Respondents copyright. The *Folsom* Court would seem to partially agree with this, were it not for the clear statement that the value of the original must be sensibly diminished.

In *Nichols v. Universal Pictures Corporation et al.*, 45 F.2d. 119 (2d Cir. 1930), the question of "stock characters" was raised. These stock characters were described by Judge Learned Hand "...those stock figures, the low comedy Jew and Irishman." *Id.*, at 121. At issue was whether in two plays the author of the second had substantially copied, and therefore financially benefited, from the author of the first. Per Judge Hand in the opinion:

"Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well...there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended." *Id.*, at 121.

Judge Hand argues here that certain concepts, such as stock figures (or perhaps geometric shapes) are de facto public domain as they are so common as to be available to everyone. As one cannot copyright the "low comedy" of certain broad comedic staples, so should one not be able to copyright the basic geometries of design.

Cain v. Universal Pictures Co. furthers this concept by adding to it the concept of "scènes à faire." *Cain v. Universal Pictures Co., Inc., et al.*, 47 F.Supp.1013 (S.D. Cal. 1942). This is the concept that a scene or design is almost obligatory for a work of its type or genre. Judge Yankwich wrote in the opinion:

"They are what the French call 'scènes à faire' Once having placed two persons in a church during a big storm, it was inevitable that incidents like these and others which are, necessarily, associated with such a situation should force themselves upon the writer in developing the theme. Courts have held repeatedly that such similarities and incidental details necessary to the environment or setting of an action are not the material of which copyrightably originality consists." *Id.*, at 1017. These 'scènes à faire' or stock figures are the common building blocks of a type of works, frequently appearing throughout the given genre.

Extrapolating this opinion to the case now before the Court, it is an obvious argument that these "uniform design elements which consist of V's (chevrons), lines, curves, stripes, angles, diagonals, inverted V's, coloring, and shapes"[10] are "incidental details necessary to the environment", which in this case consists of uniforms of all types including cheerleading uniforms, military uniforms, and CosPlay outfits. The design elements Repondent is attempt-

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[10] *Varsity Brands, Inc., et al. v. Star Athletica, LLC*, 10 Civ. 2508 (W.D. Tenn. March 1, 2014) "It employs designers who sketch design concepts consisting of "original combinations, positionings, and arrangements of elements which include V's (chevrons), lines, curves, stripes, angles, diagonals, inverted V's, coloring, and shapes "

ing to protect are the stock figures and scènes à faire of the uniform genre.

The Supreme Court itself has touched upon copyright as well, especially in *Feist Publications, Inc., v. Rural Telephone Service Co.,* 499 U.S. 340 (1991). Feist had copied sections of Rural Telephone's phone listings to use in its own publication. This is not dissimilar from the Petitioner's use in this case. The Petitioner used the simple geometric designs of the Respondent in their cheerleading uniforms, designs which involved little to no creativity on the part of the Respondent beyond the most basic arrangement—which again is not dissimilar from the alphabetical arranging of a phone book. In *Feist*, the Court held "In The Trade-Mark Cases, the Court addresses the constitutional scope of 'writings.' For a particular work to be classified 'under the head of writings of authors,' the Court determined, Originality is required." *Id.*, at 346 [Internal citations omitted]. The Court explained that originality requires independent creation plus a modicum of creativity: "The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, printings, engravings, and the like." *Id.*

In the *Feist* opinion, the Court clearly recognized the need for some level of work to remain free and accessible, and based that determination on the originality of the design. Courts would later expand this concept in to the realm of fashion and clothing. A prom dress is a prom dress regardless of how much adornment you add to it, but the concept and creativity that goes into the creation of a little black dress is minimal. *Jovani Fashion, Inc. v. Cinderella Divine, Inc.*, 808 F. Supp. 2d 542 (S.D.N.Y. 2011). As such the basic concept would not be copyrightable. Logi-

cally, this should hold true for cheerleading outfits as well. Their basic design rarely changes, and only the placement of these "uniform design elements" is altered, a process requiring little creativity. It is this principle that Judge McKeague invoked when he succinctly stated that "Without stripes, braids, and chevrons, we are left with a blank white pleated skirt and crop top." *Varsity Brands, Inc. et al v. Star Athletica, LLC,* No. 14-5237 at 33 (6th Cir. 2015) (McKeague, J., dissenting).

This is evident in *Feist* opinion, where the Court further held, "This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author." *Feist*, at 345. The elements of a work comprised only of common building blocks in logical arrangements lack the originality necessary for copyright protection.

The Second Circuit's decision in *Chosun* does establish that costumes must be considered for seperability under the law. *Chosun International, Inc. v. Chrisha Creations Ltd.*, 413 F.3d 324 (2d. Cir. 2005). In that case the court established "It is at least possible that elements of Chosun's plush sculpted animal costumes are separable from the overall design of the costume, and hence eligible for protection under the Copyright Act." *Id.*, at 329. But it is important to note that *Chosun* did not establish definitively whether the usefulness of a costume is in covering the body, or Chrisha's contention that a costume is useful "because they permit the wearer to masquerade as an animal character;" the Court

specifically said it need not answer that at the time. *Id.*, at Footnote 3.

This is the crux of the case and the opportunity for the court to resolve the disputed question: What is the use of a uniform? Does it lie merely in the covering of a body, or does it serve as a method for ready identification—and therefore any element that lends itself to that identification is part of its utility?

If the use of any costume or uniform was simply for covering the body, they wouldn't exist. The usefulness of a police uniform is that it allows a third party to identify the policeman at a glance. Just as a police uniform without certain near universal signals is simply a man in a shirt and slacks, so is a cheerleader—as the dissent points out—just a young woman in a crop top and skirt. *Varsity*, at 33. The utility of a uniform is to identify the individual who wears it, whether as a soldier, a cheerleader, or a Klingon. If clothing is only useful, or functional, as clothing, none of these things would exist.

And the question of uniforms has more immediate impact to this Court as well. Why does a judge wear a black robe? It must surely have some use beyond keeping judges from appearing in the nude. And that function is to visibly demarcate the judiciary from the rest of the court, to signify a person of respect. Without all of the elements of that robe (the color, the design of the sleeves, the length), it ceases to be a judge's robe and is instead another kind of robe, or a shroud. So too with costumes, and with cheerleading uniforms—the practical effect of identifying the wearer as a member of that group inseperably links the base construction and the identifying motifs. Form and function cannot be reasonably or legally separated in a sane or consistent fashion.

II. THE USE OF A COSTUME TO GIVE THE APPEARANCE OF BELONGING TO A GROUP, FICTIONAL OR REAL, IS FAIR USE.

A significant limitation on the use of copyright to prevent the use of a work by another party is fair use as codified in 17 U.S. Code § 107. This section creates a four-factor test for fair use including (1) the purpose and character of the use, often asked as whether the allegedly-infringing use is "transformative", (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, often phrased as whether the infringement takes the "heart" of the work, and (4) the effect of the use upon the potential market for the work.

Predominant of those is the question of whether the allegedly infringing use is transformative from the original work; "[t]he more transformative the new work, the less will be the significance of other factors." *Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579(1994).* Transformative use has often been the factor on which the rest of the analysis hinges, *See e.g. Cariou v. Prince*, 714 F.3d 694 (2013).

Fair use is an open-ended and context-sensitive inquiry, but transformative use itself has been the subject of a great deal of writing from this and other Courts. The fundamental question is "whether the new work merely `supersedes the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell* 51 U.S at 579.

In the case of CosPlay, this transformation is achieved by the very nature of its existence. It does not seek to *be* the original work, but rather to embody it and show appreciation by a fan of the work who wishes to replicate the aesthetics to express their love for it. This change in nature, from being a "real" object in a fictional world which embodies the creator's vision for his world to a replication of that in the real world, changes the meaning and message of the costume. A Starfleet Uniform, rather than being a prop used to represent a fictional organization, is a costume which represents the fan's reaction to that work.

III. RESPONDENT USES MONOPOLY PRACTICES TO LIMIT COMPETITON AND THE ABILITY FOR OTHERS TO ENGAGE IN COMMERCE.

On a more basic level the question in this case is about competition. How much does Respondent suffer, economically, from another group using similar designs? To clearly understand this, we must examine how much of cheerleading Respondent controls:

"Varsity runs all major cheer competitions and camps...It controls cheerleading's self-proclaimed governing bodies for safety and rules and international competition – seemingly independent nonprofits that lack transparency, do not enforce their own written safety rules and are financially bound to Varsity...But where Varsity Brands really makes its money is apparel. It owns cheerleading from head to toe; everything from the sequined uniforms on cheer-

leaders' backs to the big bows on their poofed-up hair."[11]

This extensive amount of control seems to be a violation of the Sherman Antitrust Act of 1890[12] as amended by the Clayton Antitrust Act of 1914[13] with regard to both monopolies and exclusive dealing agreements.

What constitutes a monopoly, or more specifically monopolization? The standard judicial meaning of monopolization in that a company possesses monopoly power in a properly-defined market, and that such power was obtained and is maintained through conduct deemed unlawfully exclusive[14].

What we have in this case is the Respondent, and all of its subsidiaries, exerting what amounts to complete control over cheerleading. This level of control serves to make it virtually impossible for any other organization to gain entry into the market. The tactic of "copyrighting" what amounts to basic geometric shapes is but one additional method of ensuring this. Varsity Brands not only controls the sale of cheerleading supplies, but they also control the groups responsible for cheerleading safety education and risk management, for safety training and certifi-

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11 Reigstad, Leif. *Varsity Brands Owns Cheerleading and Fights to Keep It From Becoming an Official Sport*, HOUSTON PRESS, July 21, 2015, http://www.houstonpress.com/news/varsity-brands-owns-cheerleading-and-fights-to-keep-it-from-becoming-an-official-sport-7606297.

12 15 U.S.C. §1-7

13 15 U.S.C. §12-27, 29 U.S.C. §52-53

14 *Id.* 26 Stat. 209, 15 U.S.C. §§ 1–7

cation programs, and for at least 16 various national and international groups that run all the cheerleading conferences, camps, and competitions[15]. Much of this, including Varsity's effort to keep cheerleading from being recognized as a sport, was brought up in *Biediger, et al., v. Quinnipiac Univ.*, 691 F.3d. 85 (2d Cir. 2012). During the case, the court was informed by testimony of the CEO of Varsity Brands, that the company envisions these cheerleading competitions as a "further promotion of his cheerleading supply business."[16]

There is the safe harbor for "competition on the merits", but this safe harbor does not apply in this case as the Respondent is not competing on the merits at all. Rather they claim that their designs are private and that no one else may use designs consisting of "V's (chevrons), lines, curves, stripes, angles, diagonals, inverted V's, coloring, and shapes." This is not a position of competition on the merits, but rather a position of competition based on exclusion.

The Court has affirmed that his kind of position constitutes a monopolization in *United States v. Grinnell Corp,* 384 U.S. 563 (1966). There the Court stated, "What defendants overlook is that the high degree of differentiation between central station protection and the other forms means that for many customers, only central station protection will do. Though some customers may be willing to accept higher insurance rates in favor of cheaper forms of protection, others will not be willing or able to risk

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15 "Varsity Brands." *Wikipedia*. Wikimedia Foundation. Web. 01 Feb. 2016.

16 Reigstad, *supra* at 10.

serious interruption to their businesses, even though covered by insurance, and will thus be unwilling to consider anything but central station protection." *Id.*, at 573 [Internal citations omitted].

This is very much similar to the hold that the Respondent, has over cheerleading. By effectively controlling all aspects of this activity, which they have lobbied heavily to have deemed to not be a sport[17], they can manage a stranglehold on competitions and even what is permitted to be used at these events. As stated by the CEO of Varsity Brand during testimony in *Biediger*, "During the 'spirit' portion of the competition, cheerleading teams are awarded points for using props, such as pom poms, sold by Varsity Brands; the more props a team uses, the more points that team receives." This is a clear ploy to sell more product, and by the Respondent controlling those product, it gives them not only an unfair leg up on their competitors, but as they also control the competitions at which these rules apply, it furthers that unfair advantage, and makes their subsidiary corporations nothing more than a marketing arms of Varsity Brands, Inc., thereby meeting the interchangeability test laid out in the du Pont case in that all can be seen as one. *See E.I. Du Pont De Nemours & Co. v. United States*, 608 F.2d 445 (1979). Varsity controls the competitions for cheerleading, creates the rules governing the competitions, and supplies the materials required to participate in cheerleading competitions.

The purpose of copyright, as pointed out in *Gyles*, is not to establish a monopoly. Quite the opposite, the

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17 "AACCA.org Cheerleading as a Sport." *AACCA.org Cheerleading as a Sport*. Web. 01 Feb. 2016.

Constitution clearly lays out its purpose: Promoting the progress of science and useful arts. U.S. Const. art. I, § 8, cl. 8. The use of copyright not as a shield for creative works but as a club to beat the competition with violates the promotional spirit embodied in the Copyright Clause, as well as the centuries of jurisprudence that have been laid down consistently in American courts since then. To extend the use of copyright far beyond its original intent in this fashion not only would further Varsity's near exclusive control of cheerleading, but risks furthering the causes of those who use traditional intellectual property protections to lock down competition rather than to promote creativity.

* * *

It is therefore clear that a finding for the Respondent in this case would have far reaching consequences beyond this instant. The methods by which the Respondent attempts to protect their brand rises at the very least to the level of unconscionability, if not monopolization. Such anti-competitive behavior should be taken in to consideration when the court considers what protections to grant the Respondent.

It is also clear from the precedents set by this Court on copyright that certain creations, which may be in essence copyrightable or have separable parts that may be copyrightable, do not enjoy the same level of protection as afforded to wholly original and creative works. This is especially true in cases where the place in question is a generic or purely functional design. Within the context of CosPlay, this is especially important. How do you copyright the idea of blue pants with a yellow stripe, a white shirt, and a dark brown vest—a description of the costume worn by Han Solo in *Star Wars*? If it is decided the "Han

Solo" outfit should be protected, where is the line drawn between the functional elements (pants, shirt, and vest) versus the decorative or separable ones? And if protectability is to be given should it be done so without consideration of the effect on the CosPlay community, or other creative enterprises which rely on the un-copyrightable nature of clothing to flourish? Such use of the original work clearly and self-evidently changes its meaning and message from the clothing of a character within the fictional universe to the clothing of a fan demonstrating their devotion *to* that universe.

And finally, the case presented by the Respondents and adopted by the Sixth Circuit fundamentally misunderstands and misstates the utility and functionality of uniforms and costumes. Their functionality extends beyond the basic clothing function of covering the body, instead functioning to identify the wearer as a member of a group, club, or culture, at a ready look.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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